FCC 93-456

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits	)	

SECOND REPORT AND ORDER

Adopted: September 23, 1993 Released: October 22, 1993

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. In this Second Report and Order ("Report and Order"), the Commission implements Section 11(c)(2) of the Cable Television Consumer Protection and Competition Act of 1992[1] by prescribing national subscriber limits and limits on the number of channels that can be occupied on a cable system by a video programmer in which the cable operator has an attributable interest ("channel occupancy limits"). The Commission declines at this time to impose limits on the degree to which multichannel video programming distributors may engage in the creation or production of video programming as authorized by Section 11(c)(2)(C) of the 1992 Act.[2]

2. We previously issued a Notice of Proposed Rule Making and Notice of Inquiry in this proceeding which sought comment generally on the objectives and scope of Section 11(c)(2) of the 1992 Cable Act.[3] The Notice also asked commenters to address various issues regarding the level at which subscriber limits and channel occupancy limits would be reasonable and the appropriate implementation of such limits. In addition, the Commission questioned whether it was necessary or appropriate to adopt limits on the degree to which multichannel video programming distributors ("multichannel distributors") should be permitted to participate in the creation or production of video programming.

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("Cable Act of 1992" or "1992 Cable Act").

[2] 47 U.S.C. § 533(f)(1)(C).

[3] Notice of Proposed Rule Making and Notice of Inquiry, 8 FCC Rcd 210 (1992)("Notice"). A list of commenters responding to the Notice is provided in Appendix A. These comments were extensively summarized in the Report and Order and Further Notice of Proposed Rule Making ("Further Notice").

The Commission subsequently issued a Report and Order and Further Notice of Proposed Rule Making[4] ("Further Notice"), which sought further comment on specific proposals regarding the adoption and implementation of subscriber limits and channel occupancy limits.

3. In summary, this Report and Order contains the following determinations. The Commission establishes a 30% limit on the number of homes passed nationwide that any one entity can reach through cable systems in which such entity has an attributable interest. Horizontal ownership will be determined for this purpose based on the same criteria used by the Commission in the broadcast context. In addition, to promote a diversity of views the Commission will permit ownership of additional cable systems, up to 35% of homes passed nationwide, provided such systems are minority-controlled. However, in view of the recent federal district court decision holding that the Commission's statutory authority to adopt horizontal ownership limits is unconstitutional, and to avoid potential confusion and uncertainty during the period of judicial review the Commission is staying the effective date of the horizontal ownership rules until final judicial resolution of the District Court's decision.[5]

4. With respect to vertical ownership limits, the Commission adopts a 40% limit on the number of channels that can be occupied on a vertically integrated cable system by video programmers in which the cable operator has an attributable interest. In order to promote a diversity of views the Commission will allow carriage of vertically integrated programming services on two additional channels, or up to 45% of a system's channel capacity, whichever is greater, provided such video programming services are minority-controlled. Vertical attribution is defined for this purpose by reference to the Commission's broadcast attribution criteria. The channel occupancy limits will apply only up to 75 channels. Channel capacity beyond 75 channels will not be subject to vertical ownership restrictions at the present time.

5. The Commission further concludes that in view of the

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[4] Report and Order and Further Notice of Proposed Rule Making in MM Docket No. 92-264, FCC 93-332, released July 23, 1993, ("Further Notice"). A list of commenters responding to the Further Notice and the references to specific commenters used herein is provided in Appendix B.

[5] See Daniels Cablevision v. United States, No. 92-2292 (D.D.C. released September 16, 1993). The vertical ownership limits adopted pursuant to Section 11, which were upheld by the Court are not stayed and will become effective as set forth in para. 109 infra.

structural and behavioral restrictions already required under the 1992 Act, additional restrictions on the ability of multichannel distributors to engage in the creation or production of video programming are unwarranted at the present. The Commission believes that at the present time the objectives of such a restriction are fully addressed by the vertical and horizontal ownership limits required by Section 11, as well as by the carriage agreement and program access provisions contained in Section 12, and Section 19 of the 1992 Cable Act.

II. BACKGROUND

6. The 1992 Cable Act and its legislative history demonstrate Congress' concern regarding horizontal concentration and vertical integration in the cable television industry. The vertical and horizontal limits required by Section 11 of the 1992 Cable Act are intended to address these concerns. In particular, Congress sought to prevent large, vertically integrated cable systems from creating barriers to entry for new programmers and from causing a reduction in the number of media voices available to consumers. In addition, the 1992 Cable Act was intended to curb the ability and the incentive of cable operators to favor their affiliated video programmers over unaffiliated or competing video programming services. Congress also sought to restrict the degree to which vertically integrated program suppliers favor their affiliated cable operators over unaffiliated cable operators and other program distributors.[6]

7. In adopting Section 11 of the 1992 Cable Act, Congress also recognized that certain benefits derive from vertical integration and horizontal concentration. For example, the House Report acknowledges that vertical relationships promote program diversity and make the creation of new and innovative programming services possible.[7] Further, the House Report suggests that vertical relationships may be an efficient way of financing new programming services and compensating cable operators for assuming some of the risk associated with the launch of new cable programming services.[8] With respect to horizontal concentration, the House Report recognized that consolidation in the cable industry has benefited consumers by allowing efficiencies in the administration, distribution, and procurement of programming. The House Committee also noted that horizontal concentration may help promote the introduction of new services into an increasingly competitive programming market by providing capital

[6] Cable Act of 1992, Section 2.

[7] House Report at 41.

[8] Id.

and a ready subscriber base for such new services.[9] The House Report concluded that large multiple system operators ("MSOs") are able to take risks that small operators are not, and that such MSOs provide a large enough subscriber base to facilitate new program entry.[10] The Senate Report similarly acknowledged that horizontal concentration may reduce programmers' transaction costs by eliminating the need for negotiation with individual local cable systems across the country.[11]

8. Recognizing these conflicting factors, Congress directed the Commission to consider and balance the following public interest objectives in establishing the ownership limits mandated by Section 11: (A) to ensure that no cable operator or group of cable operators can unfairly impede the flow of video programming from the programmer to the consumer; (B) to ensure that cable operators do not favor affiliated video programmers in determining carriage and do not unreasonably restrict the flow of video programming of affiliated video programmers to other video distributors; (C) to take account of the market structure, ownership patterns, and other relationships of the cable industry, including the market power of the local franchise, joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests; (D) to take into account any efficiencies and other benefits that might be gained through increased ownership or control; (E) to make rules and regulations that reflect the dynamic nature of the communications marketplace; (F) to impose no limitations that prevent cable operators from serving previously unserved rural areas; and (G) to impose no limitations that will impair the development of diverse and high quality programming.[12]

III. SUBSCRIBER LIMITS

A. Background.

9. Section 11 of the 1992 Cable Act amends Section 613 of the Communications Act to require the Commission to prescribe regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable

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[9] Id. at 43.

[10] Id.

[11] Senate Report at 33.

[12] 47 U.S.C. § 533(f)(2).

interest.[13] The adoption of such ownership limits was meant to address Congress' concerns regarding increasing horizontal concentration in the cable industry.

10. Horizontal concentration in this context is based on the share of subscribers served by individual cable companies through their ownership or control of local cable systems. According to information provided to Congress, the top five firms serve almost half of the nation's cable subscribers. Congress concluded that this degree of concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market.[14] Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers.[15]

11. Although under traditional antitrust analysis the cable industry is relatively unconcentrated, the 1992 Cable Act requires the Commission to establish limits on horizontal concentration.[16] The Conference Report is silent regarding what shall constitute reasonable limits for this purpose. The House Report, however, indicates that antitrust analysis should not be the sole measure of concentration in the cable industry.[17] The House Report suggests that diversity of information sources can

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[13] 47 U.S.C. § 533(f)(1)(A).

[14] House Report at 42-43.

[15] 1992 Cable Act, Section 2(a)(4).

[16] Under the two prevailing measures of market concentration -- the four firm concentration ratio ("Four Firm Ratio") and the Hirfindahl-Hirschman Index ("HHI"), the cable industry is not concentrated. The Four Firm Ratio measures the percentage of the market captured by the four largest companies in the market. The HHI reflects the distribution of market share among all firms in a given market, giving proportionately greater weight to the market shares of the larger firms. A market is generally considered concentrated when one firm, or a small group of firms, has a sufficient share of the market to exercise power over it. The Justice Department considers an industry concentrated when the HHI exceeds 1800 (although an HHI that exceeds 1000 prompts further evaluation) or when the four firm ratio exceeds 50%. According to the House Report, the HHI for the top 20 MSOs is 491 and the Four Firm ratio for the largest MSOs is 36%, well below the Justice Department's threshold. See House Report at 42.

[17] House Report at 42.

only be assured by imposing limits on the ownership of media outlets that are substantially below those that traditional antitrust analysis would support.

12. The Commission's own analysis regarding horizontal concentration also concluded that the cable industry has become increasingly concentrated. In its 1990 Report to Congress, the Commission noted that in 1989 the two largest MSOs together served almost 34% of all cable subscribers nationwide, and that the top 10 cable companies served 32.9 million of the nation's 53 million subscribers.[18] We indicated that this degree of concentration among companies that frequently do not face local competition raised "the question of whether MSOs (particularly the largest MSOs) have attained sufficient market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution services."[19] The Commission also indicated that, on the local level, relatively few cable operators face competition from other multichannel video distributors for either programming or subscribers.[20] The Commission concluded that it was this level of local concentration that provided MSOs with the potential to take anti-competitive action against video programming services and competing multichannel providers.[21]

13. On the other hand, the Commission indicated in its 1990 Cable Report that consolidation in the cable industry produced significant benefits and efficiencies to consumers.[22] We noted that higher concentration levels enabled cable companies to take advantage of economies of scale and foster investment in more and better original programming and a wealth of viewing options for consumers. Further, the Commission found that the growth of MSOs had produced significant efficiencies in administration, distribution and procurement of programming which can promote the introduction of new video programming services.[23] Congress similarly found that such benefits and efficiencies result from increased concentration and instructed the Commission to strike a balance between such benefits and the potential for anti-competitive conduct in determining the appropriate level at

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[18] Report in MM Docket No. 89-600, 5 FCC Rcd 4962, 5005 (1990) ("1990 Cable Report").

[19] Id. at 5003.

[20] Id. at 5004.

[21] Id. at 5006.

[22] Id. at 5009.

[23] Id.

which to establish subscriber limits.[24]

B. **Applicable Market**.

14. Further Notice. In the Further Notice, we proposed to adopt exclusively national subscriber limits and asked commenters to indicate whether national subscriber limits would suffice to implement the objectives of the 1992 Cable Act. With respect to regional limits, we tentatively concluded that the benefits of regional concentration outweigh the potential anti-competitive harm that such concentration may have on the local advertising and programming marketplace. Commenters were asked to address this tentative conclusion.

15. Comments. The majority of commenters addressing this issue favor adoption of exclusively national subscriber limits. Several commenters argue that the 1992 Cable Act does not require or even authorize the Commission to promulgate regional subscriber limits. Moreover, commenters indicate that national limits best serve the objectives of the 1992 Cable Act since most programming distribution occurs on a national, not a regional, basis. These parties add that regional limits would threaten the marketplace efficiencies afforded by regional concentration and would impede the incentive of cable operators to invest in fiberoptic and digital compression technologies that will greatly improve cable service and expand channel capacity. Only INTV supports imposing regional subscriber limits, arguing that such limits are necessary to curb the anti-competitive power of MSOs in local advertising markets.[25] However, numerous commenters respond that there is no evidence that cable operators possess market power in the local advertising or program acquisition markets. These commenters contend that in fact, no such evidence exists because the power of cable operators in these markets continues to lag behind local broadcast stations.[26]

16. Discussion. While we disagree with commenters who

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[24] House Report at 43; Senate Report at 33.

[25] INTV contends that in markets with only one cable operator, that operator is the conduit for all local advertising and therefore is in the position to dictate local advertising prices, which places other local media (e.g., TV stations) at a considerable disadvantage. INTV Initial Comments at 7-8. In response, cable commenters argue INTV's assertions are disingenuous since data shows that broadcast stations continue to control an overwhelming share of the local advertising market as compared to cable interests. See TCI Initial Reply Comments at 19-20; NCTA Initial Reply Comments at 12-13.

[26] See NCTA Comments at 4-6; Time Warner Comments at 5.

assert that the Commission is without authority to adopt regional subscriber limits, we decline to adopt such limits at this time. The Senate Report indicates that even prior to the passage of the 1992 Cable Act the Commission had the necessary authority to adopt horizontal limits at the regional level if it found that such restrictions were warranted.[27] Nevertheless, based on the record in this proceeding and on our interpretation of the 1992 Cable Act, we are persuaded that Congress was primarily concerned with national concentration in the cable industry. While the Senate Report indicates that horizontal concentration "at the regional and national level could present concerns about market power," the Report goes on to say that the FCC is required to establish horizontal ownership limits in order to "address the issue of national concentration in the cable industry."[28] Moreover, Congress' objectives in requiring horizontal ownership limits -- to prevent the "concentration of the media in the hands of a few" and to limit the ability of MSOs to exercise undue market power in the program acquisition market -- can best be served by the adoption of national subscriber limits. Issues of regional concentration we believe would be better addressed by other provisions of the 1992 Act designed to promote the introduction of competition to established cable franchises.

17. In addition, we find no basis in the record at this point for imposing regional limits that could reduce investment in the development of regional programming, upgraded cable infrastructure and improved customer service. We believe that the potential benefits and efficiencies of regional concentration outweigh any anti-competitive affects in the local programming or advertising marketplace. In fact, the record suggests that cable operators do not possess undue power in the local programming or advertising markets where they face competition from local broadcast stations and other multichannel program distributors. In the absence of record evidence suggesting that any cable operator possesses undue power in the local programming or advertising market, we conclude that it is unnecessary to adopt regional limits at this time.

C. **Measurement and Percentage Limitation**.

18. Further Notice. The Further Notice proposed to establish subscriber limits as a share of homes passed and sought comment on that proposal. We further proposed to adopt a 25%

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[27] The Senate Report states that "[a]lthough the FCC has the authority to impose horizontal limitations on the cable industry (both national and regional) it has not done so." Senate Report at 34.

[28] Senate Report at 32-34.

limit on the number of homes passed by cable systems owned by any one entity, although we continued to seek comment on a limit in the range of 20% to 35% of homes passed. We also asked commenters to indicate whether it would be appropriate in calculating compliance with the subscriber limits to subtract the number of homes passed by cable systems where effective competition -- as defined in the 1992 Cable Act -- is established. Finally, we asked commenters to address our proposal to allow ownership of additional cable systems, beyond the specified limit, provided such systems are minority-controlled.

19. Comments. All commenters responding to the Further Notice favor measuring the audience reach of cable systems by a homes passed standard rather than a subscriber-based standard.[29] Most commenters agree that a homes passed standard is more appropriate because a measure based on the number of subscribers is relatively unstable and may have the effect of discouraging subscriber growth.

20. On the issue of establishing a reasonable limit on horizontal concentration, cable commenters continue to advocate a subscriber limit of approximately 30% to 40% of homes passed nationwide.[30] These commenters argue that the record does not support the Commission's proposal to adopt a 25% ownership limit. In addition, these commenters assert that in the absence of empirical evidence that existing levels of concentration afford cable operators undue power in the programming market, the Commission should establish subscriber limits significantly above 25%. NCTA, TCI and Time Warner also support allowing additional investments in cable systems beyond the proposed limit provided

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[29] See NCTA Comments at 9; Liberty Media Initial Comments at 32; NATOA Comments at 14; Discovery Comments at 8-9; MPAA Comments at 2; INTV Initial Comments at 4; TCI Initial Comments at 28-29. Time Warner continues to advocate its earlier proposal that horizontal limits should be measured as fraction which has (a) as its numerator, the number of cable subscribers served by a particular cable operator; and that has (b) as its denominator, the sum of (i) the number of all cable subscribers nationwide and (ii) the number of subscribers served by other multichannel video programming distributors. However, Time Warner concurs with the Commission's proposal to measure horizontal ownership as a share of homes passed nationwide. Time Warner Comments at 9-10.

[30] See Liberty Media Comments at 9; NCTA Comments at 7-8; TCI Comments at 13-17; Time Warner Comments at 7-8; Discovery Initial Comments at 9.

such cable systems are minority-controlled.[31] TCI suggests that all investments in minority-controlled cable systems should be exempt in order to encourage MSOs to invest in a large number of minority-controlled cable systems. According to these commenters, such ownership incentives will increase minority ownership of cable systems and promote programming diversity.

21. Cable commenters contend that the record indicates that cable systems with a 30% to 40% share could not preclude the launch or success of new video programming services and that establishing ownership limits below this level will impede the development of new cable technologies. Moreover, cable commenters rely on antitrust principles to argue that MSOs must have at least a 50% market share in order to be regarded as having market power. Cable commenters further assert that the program access, must carry, leased access and rate regulation provisions of the 1992 Cable Act already prevent the abuses Congress was concerned might result from excessive horizontal concentration and therefore the structural limits imposed by subscriber limits need not be overly restrictive. Finally, cable commenters contend that adoption of a 25% limit will stifle investment in new cable programming and the development of new technologies because cable operators will not have adequate advertising revenues and subscriber fees to reinvest.

22. In support of their position that a 30% to 40% subscriber limit is reasonable, cable commenters add that extensive subscriber penetration is not essential to the success of a new programming network. Time Warner, TCI and NCTA observe that many cable programming services have flourished at subscriber penetration levels well below 60%.[32] Therefore, these commenters contend that there is no basis on which to conclude that an MSO with a 30% to 40% market share can impede the success of new video programming services.

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31 See NCTA Comments at 9; TCI Comments at 18; Time Warner Comments at 7-8.

32 These commenters note that program networks such as Black Entertainment Television, The Learning Channel, Bravo and Court TV have had achieved success with penetration levels of less than 30% to 40%. See Time Warner Comments at 7-8; TCI Comments at 17; NCTA Comments at 7. In addition, Time Warner notes that The Family Channel, which was launched in 1977 achieved less than 10% penetration of all cable homes by its second year of operation, achieved only 22.1% in its third year, but approached 60% penetration by its sixth year of carriage. Another example provided by Time Warner is Nickelodeon, which achieved only 15.1% penetration in its second year of operation and now enjoys over 90% penetration. Time Warner Initial Comments at 27-28.

23. In contrast to the cable commenters, MPAA continues to advocate a 25% subscriber limit. MPAA argues that a limit of 25% of homes passed is reasonable because it does not require divestiture and would in fact allow most cable operators to expand. MPAA also contends that there are no compelling public interest factors which support a subscriber limit higher than 25%. MPAA asserts that higher levels of concentration are not necessary to induce cable operators to invest in the development of advanced cable technologies, and cites numerous examples of cable companies, with subscriber levels below six percent, who have committed to major investments in the deployment of advanced cable technologies.[33] NATOA similarly supports the 25% limit proposed in the Further Notice, arguing that any higher limit would be inadequate to serve Congress' objectives and would allow cable operators to preclude the success of new or competing video programming services by denying them access to an adequate subscriber base to develop the necessary level of viewership.[34]

24. Discussion. The language of Section 11(C)(2)(A) speaks of establishing limits on "the number of cable subscribers" any one person can reach through cable systems owned by such person. We believe that the term "reach" can be reasonably construed to mean the share of homes passed by a cable operator. Such a measure necessarily encompasses all potential cable subscribers and constitutes a more stable basis on which to impose horizontal limits. Moreover, this interpretation would more adequately reflect a cable operator's potential reach, by encompassing all of the cable homes to which a particular cable operator controls access.[35]

25. In adopting ownership limits we seek to balance two competing concerns raised by Congress: on the one hand, the possibility that large horizontally integrated MSOs might have the ability to preclude the launch of new video programming services and on the other hand, the benefits and efficiencies that result from greater horizontal concentration.[36] Based on our consideration of these statutory factors and on the preponderance of the data provided in the record, we conclude

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33 See MPAA Comments at 3.

34 See NATOA Comments at 13-14.

35 The Commission similarly employs a homes passed measure to implement the revised network/cable cross-ownership restrictions. See Second Report and Order in MM Docket No. 82-434 (Elimination of Prohibition on Network Cable Cross-Ownership) 7 FCC Rcd 1 (1992).

36 See para. 7 supra.

that a horizontal ownership limit prohibiting any one entity from having an attributable interest in cable systems that in the aggregate reach more than 30% of cable homes passed nationwide strikes the proper balance. A 30% horizontal ownership limit is generally appropriate to prevent the nation's largest MSOs from gaining enhanced leverage from increased horizontal concentration. Nonetheless, it also ensures that the majority of MSOs continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming services and the deployment of advanced cable technologies.

26. We believe that this 30% limit is reasonable to prevent the types of anti-competitive conduct which concerned Congress, particularly when coupled with the behavioral restrictions contained in Sections 12 and 19 of the 1992 Cable Act, which are similarly intended to prevent cable operators from exercising undue power vis-a-vis video programmers and consumers.[37] Moreover, Sections 4 and 5 require cable operators to carry the signals of local commercial and non-commercial broadcast stations. The vertical ownership limits adopted herein and Section 612 of the Communications Act also require cable systems to make a specified percentage of channels available to unaffiliated programmers, which ensures that a diversity of views are presented to cable subscribers. The cumulative effect of these regulations coupled with a horizontal ownership limit of 30% should protect against any one cable system exerting undue power that could prevent the success of new video programming services or "unfairly impede the flow of video programming to the consumer."[38] We also believe that this limit combined with the above mentioned provisions will be appropriate to address the diversity aims which underlie the statutory horizontal ownership provisions. At the same time such a limit will allow the majority of cable operators to expand their system ownership and avail themselves of any efficiencies and other benefits which might be gained through increased ownership or control of cable systems.[39]

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[37] Specifically, the restrictions required by Section 12 are designed to prevent cable operators, as well as other multichannel video program distributors, from requiring a financial interest or exclusive rights in a video programming service as a condition of carriage. In addition, Section 19 of the 1992 Cable Act prohibits vertically integrated cable operators from engaging in unfair or deceptive acts or practices the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing programming to consumers.

[38] 47 U.S.C. § 533(f)(2)(A).

[39] 47 U.S.C. § 533(f)(2)(D).

27. While we proposed a 25% horizontal ownership limit in the Further Notice, we sought comment on a range of 20% to 35%. In concluding that a 30% limit was reasonable we considered a number of factors including the indication in the legislative history of this provision that Congress did not intend necessarily to require the divestiture of any existing interests.[40] In this regard, the Senate Report states that "[t]he legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable."[41] Thus, we determined that in the absence of definitive evidence that existing levels of ownership are sufficient to impede the entry of new video programmers or have an adverse affect on diversity, existing arrangements should not be disrupted. Based on our review and consideration of the record, we are persuaded that such divestiture is unnecessary. There is ample support in the record for a limit of at least 30%. Moreover, we believe that a 30% limit in conjunction with other provisions of the 1992 Cable Act is reasonable to prevent cable operators from creating barriers to the entry of new video programmers without unduly restricting their ability to reach their desired audience. Such a limit will also enable cable operators to avail themselves of the benefits and efficiencies of horizontal concentration and may provide an incentive for MSO investment in upgraded technology and infrastructure.

28. As we proposed in the Further Notice, in order to encourage a diversity of viewpoints we will allow ownership of additional cable systems reaching up to 35% of cable homes passed, provided such additional cable systems are minority-controlled. The Commission has long supported increased minority participation and ownership in the cable industry, believing that such minority ownership is a significant means of fostering the

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[40] We note in this regard that the largest existing MSO, TCI, using the attribution standards adopted herein, has an interest in cable systems passing approximately 23.8 million homes or 27% of homes passed nationwide. See TCI submission dated September 22, 1993. This number is larger than the number used for corporate and other reporting requirements because, inter alia, it includes systems in which an "attributable interest" is held rather than systems that are treated as "consolidated for certain corporate and other reporting purposes. Compare, Television Digest, June 7, 1993, p. 4 (TCI and consolidated subsidiaries in which the ownership interest is greater than 50% as of December 31, 1992, pass 17.7 million homes).

[41] Senate Report at 34.

inclusion of a diversity of views in cable programming.[42] We are convinced that the minority ownership incentive we adopt today in connection with the horizontal ownership limits will be an important means of furthering this goal by encouraging MSO investment in minority-owned cable systems, which in turn will promote additional minority ownership of cable facilities and greater minority participation in the selection of programming. We believe that the increased diversity that this additional minority ownership will encourage outweighs the marginal impact on competition that could result from the increased concentration. Notably, we provide a similar incentive in the broadcast context to increase the diversity of programming.[43]

29. We decline to calculate compliance with the national subscriber limits by subtracting the number of homes passed by cable systems in areas where effective competition is established. The statutory provisions and the implementing rules we are adopting focus on ensuring that system operators are constrained in terms of the total share of the market they may occupy in order that no single operator exerts an undue influence, particularly at the national level, on the diversity of programming services available through cable television. The presence of competition in particular markets ameliorates some of the concerns involved and provides members of the public in those markets with the opportunity, through the competitor they select, to influence directly the services offered in those markets. The presence of effective competition in any given system or group of systems does not, however, directly respond to Congress' concern about the exercise of undue control by a single entity at the national level.

D. Horizontal Attribution Standard.

30. Further Notice. In the Further Notice we proposed to adopt the broadcast attribution standard to implement horizontal ownership limits and asked commenters to indicate whether this standard was appropriate. We indicated that since these same attribution criteria are used to implement the broadcast multiple ownership rules and cable cross-ownership rules, which have similar objectives, it would appear that they are also appropriate in the context of cable subscriber limits.

31. Comments. Cable commenters generally advocate an

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[42] See Policy Statement on Minority Ownership of Cable Television Facilities, 52 RR 2d 1469, 1471 (1982)(expanding Commission's tax certificate policy to include sales and exchanges of cable television facilities in order to encourage minority ownership of cable facilities).

[43] See 47 C.F.R. § 73.3555(e)(1).

attribution standard based on actual control which they contend is more appropriate in determining the ability of a cable operator to control the programming decisions of a particular system.[44] While these commenters recognize that control may be exerted by less than a majority interest, they nevertheless assert that 5% is far too low a standard. NCTA advocates a 20% attribution threshold and Time Warner favors a 25% equity threshold.

32. TCI continues to advocate an attribution standard that would (1) exempt ownership interests under 10% ownership; (2) attribute interests of 50% or more; and (3) prorate interests between 10% and 50% based on the number of subscribers served by the system.[45] Generally, TCI and the other cable commenters oppose adoption of the broadcast attribution criteria in this context arguing that such a strict standard is inappropriate because a 5% interest holder is incapable of influencing a cable system's program choices.[46]

33. On the other hand, MPAA, ABC, E! Entertainment, Turner and BET support the use of the broadcast attribution criteria. Specifically, MPAA observes that these criteria have worked well in the broadcast area and were suggested in the legislative history as the appropriate criteria to used in the cable context.[47]

34. Discussion. We believe that the broadcast attribution criteria contained in Section 73.3555 of the Commission's rules are appropriate to implement the horizontal ownership limits.[48]

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[44] See NCTA Comments at 10-11; Time Warner Comments at 13; Liberty Media Initial Comments at 17.

[45] See TCI Comments at 19-24. TCI would also incorporate a single majority shareholder exception as is used in the broadcast context. Id.

[46] See Time Warner Comments at 13. Time Warner also contends that Congress did not intend for the Commission to adopt such a strict attribution standard, noting that the Senate Report that preceded the 1992 Cable Act mentioned the broadcast standard under Section 73.3555 as a possible model for developing attribution criteria. Id.

[47] See MPAA Comments at 6.

[48] For the sake of convenience, the actual rules now being adopted reference the standards set forth in the notes to Section 76.501 of the rules (cable ownership rules). These are derived from and are not substantively different from those generally referred to as the broadcast attribution rules, i.e., Section

Pursuant to these criteria, all voting stock interests of 5% or more are attributable. Non-voting stock interests (including most "preferred" stock classes) are not attributable. There are several exceptions to the presumption of attribution created by the 5% benchmark. Most notably there is a single majority shareholder exception, which provides that minority interests will not be attributed where there is a single 51% shareholder. In addition, the interests of "insulated" limited partners are not attributed.

35. In employing the Section 73.3555 attribution criteria for this purpose, we note that the objectives of the broadcast attribution model are consistent with our goals in establishing ownership standards for subscriber limits. In this regard, the broadcast attribution rules focus on ownership thresholds that enable a broadcast licensee to influence or control management or programming decisions. We believe these same issues are also relevant to addressing the concerns at issue in this proceeding relating to the ability of cable operators to unduly influence the programming marketplace. We also note that the legislative history of the 1992 Cable Act supports the use of the broadcast attribution criteria.[49]

E. Enforcement.

36. Further Notice. The Further Notice asked commenters to address how compliance with the subscriber limits should be monitored and enforced. We indicated that since few cable systems were in the proposed range of 20%-35%, a certification process may be appropriate to enforce such limits. We suggested that cable operators reaching 20% of homes passed could be required upon transfer or assignment of a cable system to certify that the transfer or sale of such system would not violate the subscriber limits. Alternatively, we noted that such certification may be unnecessary if the Commission could monitor horizontal concentration by reference to publicly available information. We asked commenters to indicate what sources are publicly available that would enable the Commission to monitor horizontal concentration according to the number of homes passed by the largest cable systems. We also asked commenters to indicate if the Commission should consider waivers of the subscriber limits in appropriate cases and whether the Commission should periodically review the subscriber limits to determine

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73.3555.

[49] See Senate Report at 80. The Senate Report indicates that the Commission should use the attribution criteria set forth in Section 73.3555 (Notes) of our Rules, or such criteria as the Commission deems appropriate in determining ownership under the subscriber limit regulations.

their continuing relevance.

37. Comments. MPAA and most cable commenters support the proposed system of certification to enforce subscriber limits. NCTA and Time Warner, however, indicate that the Commission need not institute a certification process to enforce the subscriber limits since so few companies are near the proposed limits. NCTA suggests that the Commission can readily obtain information regarding the number of cable homes passed using data from Kagan Associates or Cable Television Financial Data, which are relied upon by the industry for subscriber information according to homes passed. Alternatively, TCI and Liberty Media advocate complaint-based enforcement.

38. Time Warner and NCTA also suggest that the Commission should consider waivers in appropriate cases such as for expansion of service into previously unserved rural areas and for *de minimis* violations (*e.g.*, when commercial circumstances temporarily place an operator over the limits).[50] In addition, MPAA, Time Warner and NCTA favor the Commission's proposal to review the subscriber limits every five years.[51]

39. Discussion. We conclude that in order to enforce most efficiently and effectively the horizontal ownership limits, we should institute a system of certification. Although public information is available from various sources regarding the number of homes passed by the largest cable operators, such sources generally apply different attribution criteria than the Commission has decided to employ. Therefore, we will require entities holding attributable interests in cable systems reaching 20% or more of homes passed nationwide to certify to the Commission, prior to the acquisition of any additional cable systems, that such acquisition will not result in a violation of the horizontal ownership limits adopted herein.[52] Where a transaction will result in a cable operator exceeding the limit, the cable operator must seek either a permanent or temporary waiver from the Commission, which might also include a commitment to divest a sufficient number of systems so as to come into

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[50] *See* Time Warner Comments at 14; NCTA Comments at 12-13.

[51] *See* MPAA Comments at 2 & 6-7; Time Warner Comments at 14; NCTA Comments at 13.

[52] We contemplate that the MSO whose aggregate attributable interests in cable systems equals or exceeds 20% of homes passed nationwide will be responsible for filing the requisite certification. Thus, if a system in which TCI holds an attributable interest acquires an additional cable system, TCI will be the party responsible for certifying to the Commission that the transaction will not result in a violation of FCC rules.

compliance with these ownership limits after the acquisition is completed. The Commission will consider waiver requests only in limited circumstances where an acquisition temporarily places a cable operator over the permissible number of subscribers or where an MSO seeks to expand service into an otherwise unserved rural area.

40. Finally, in view of the fact that the cable television industry is so dynamic and fluid, we believe that periodic review of the ownership limits is necessary. As we proposed in the Further Notice, we plan to review the subscriber limits every five years to determine whether such limits are reasonable under the prevailing market conditions and whether such limits continue to serve the objectives for which they were adopted. We regard such periodic review as an important means of addressing Congress' intent that such rules reflect the "dynamic nature of the communications marketplace."[53]

IV. CHANNEL OCCUPANCY LIMITS

A. Background

41. Section 11 of the 1992 Cable Act also requires the Commission to establish reasonable limits on the number of cable channels that can be occupied by a video programmer in which a cable operator has an attributable interest.[54] Congress adopted this provision to address its concerns that the cable industry has become increasingly vertically integrated and that as a result cable operators have the ability and the incentive to favor their affiliated programmers over unaffiliated or competing distributors. Vertical integration in this context refers to common ownership of both programming and distribution systems. Such integration, Congress determined, could make it difficult for non-cable affiliated or competing programmers to secure carriage on vertically integrated cable systems.[55] Congress similarly found that vertically integrated program suppliers have the incentive and the ability to favor their affiliated cable operators over unaffiliated operators and program distributors using other technologies.[56]

42. According to the House Report, some vertically integrated MSOs favor video programming services in which they

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53 47 U.S.C. § (f)(2)(E)

54 47 U.S.C. § 533 (f)(1)(B).

55 Cable Act of 1992, Section 2 (a)(5).

56 Id.

have an ownership interest, denying system access to unaffiliated programmers and programmers affiliated with rival MSOs. The House Report also found that such vertically integrated MSOs may discriminate against rival video programming services with regard to price, channel positioning, and promotion.[57] In addition, Congress was concerned that vertical integration limits diversity of cable programming and reduces the number of voices available to the public. In this respect, the Senate Report likens the channel occupancy limits to the Commission's broadcast one-to-a-market rule, which is similarly designed to increase the diversity of voices available to the public.[58]

43. On the other hand, the House Report cites a study by the National Telecommunications and Information Administration ("NTIA"), which concluded that common ownership of cable systems and cable programming services did not appear to affect adversely the supply of cable programming or diversity of viewing choices for cable subscribers.[59] NTIA found that none of the top five MSOs showed a pattern of favoring basic services with which they were affiliated. Congress also acknowledged that significant benefits have resulted from vertical relationships in the cable industry. In particular, the House Report cited C-Span, CNN, Black Entertainment Television, Nickelodeon, and the Discovery Channel as examples of innovative programming that would not have been feasible without the financial support of cable system operators.[60]

44. In the 1990 Cable Report, the Commission also found that the cable industry had become vertically integrated. In this regard, the Commission observed that MSOs had equity interests in 13 of the top 20 national basic cable networks and in 6 of the top 8 pay cable networks.[61] We concluded that vertical integration had accelerated in the cable industry, but that such vertical relationships had increased both the quality and quantity of cable programming services. We found that MSO investment was responsible for the development and survival of several of the most popular video programming services. We also determined that vertical integration among the largest MSOs had

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[57] House Report at 43.

[58] Senate Report at 80. The one-to-a-market rule is contained in Section 73.3555 of the Commission's rules.

[59] House Report at 41, citing Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-223, June 1988, p. 102.

[60] House Report at 41.

[61] Cable Report at 5009.

contributed to program diversity by providing new video programming services with an extensive subscriber base and information regarding viewer tastes and desires for new programming.

45. As with the establishment of horizontal ownership limits, we seek to establish channel occupancy limits which strike the proper balance between competing statutory objectives: to ensure that vertically integrated cable operators do not favor affiliated video programmers, or unfairly impede the flow of video programming to cable subscribers, on the one hand and, on the other, to encourage MSOs to continue to invest in the development of diverse and high quality video programming services.[62] Congress expressly indicated that the Commission should "not impose limitations which would impair the development of diverse and high quality programming."[63]

B. Application of Channel Occupancy Limits.

46. Further Notice. In the Further Notice we indicated that the statutory language and legislative history were unclear regarding how Congress intended such channel occupancy limits to be applied. In particular, we noted that we were uncertain whether Congress intended such limits to apply only to video programmers affiliated with the operator of the particular cable system in question or whether such limits were intended to apply to carriage of all cable affiliated video programming on all cable systems. We also questioned whether in calculating a system's channel capacity we should subtract the number of broadcast, PEG and leased access channels.

47. Given the ambiguity, we proposed to apply such limits only to video programmers affiliated with the particular cable operator. We noted that such an interpretation would be consistent with Congress' objectives of increasing diversity and expanding the number of voices available to consumers. Moreover, we observed that such an interpretation would address Congress' goal of reducing the ability and the incentive of cable operators to favor their affiliated video programmers. We also proposed to include all activated channels including broadcast, PEG and leased access channels in calculating system capacity.

48. Comments. Cable commenters assert that the statutory language and the purpose of the legislation make clear that Congress intended for such limits to apply only to video programming services affiliated with the particular cable

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[62] See para. 7 supra.

[63] 47 U.S.C. § 533 (f)(2)(G).

operator.[64] According to these parties, cable operators have no incentive to favor a video programmer affiliated with a rival MSO. Nor do they have the ability to influence the programming content of such unaffiliated video programming services. Several commenters also assert that the establishment of channel occupancy limits raises serious First Amendment concerns that will be exacerbated by an unnecessarily broad application of such limits to carriage of all affiliated video programming services on all cable systems.[65]

49. Most commenters also agree that the Commission should take into account all activated channels, including all broadcast, PEG and leased access channels, in calculating system capacity.[66] These commenters note that such channels provide unaffiliated and diverse programming that is competitive with affiliated programming. According to cable commenters, subtracting broadcast, PEG, and leased access channels is unwarranted as a policy matter and would penalize cable operators who carry the broadest array of broadcast, PEG and leased access channels by reducing the channel base available for carriage of affiliated video programming services.

50. In contrast, NATOA contends that the FCC should subtract all broadcast, PEG and leased access channels in

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[64] See NCTA at Comments 13-14; Turner Comments at 6; Cablevision Systems Initial Comments at 10; TCI Initial Comments at 35-36; Time Warner Initial Comments at 45-48; IFE Initial Comments at 7-9; Liberty Media Comments at 13; E! Entertainment Initial Comments at 7; Discovery Comments at 5; and Viacom Comments at 7-8; CIC/CC Initial Comments at 35-37. Commenters cite to language in the Conference Report stating that the Commission shall adopt reasonable limits on the "number of channels that can be occupied by a programmer that is owned by a cable operator or in which the cable operator has an attributable interest." Conference Report at 81 (emphasis added).

[65] See Time Warner Initial Comments at 2; Turner Comments at 4; Viacom Initial Comments at 2-3; NCTA Initial Comments at 24; TCI Initial Comments at 29; CIC/CC Initial Comments at 35; Cablevision Systems Initial Comments at 9-10; Liberty Media Initial Comments at 12, n.5.

[66] See NCTA Comments at 14; Turner Comments at 5; Viacom Comments at 5-8; Time Warner Initial Comments at 41-42; Discovery Comments at 6; CIC/CC Initial Comments at 39-40; Liberty Media Comments at 13-14; MPAA Comments at 9.

calculating channel capacity.[67] NATOA maintains that the legislative history indicates that Congress intended such channels to be subtracted prior to application of the channel occupancy limits.[68] NATOA also notes that adherence to this procedure would yield more channel capacity for unaffiliated programmers.[69]

51. Discussion. Section 11(c)(2)(B) requires the Commission to "establish reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[70] The language contained in Section 11(c)(2)(B) of the 1992 Cable Act is not entirely clear because it can also be read as applying to carriage of video programmers affiliated with the particular cable operator or to carriage of any vertically integrated cable programmer on any cable system. However, the Conference Report specifies that such limits shall apply to "the number of channels that can be occupied by a video programmer that is owned by a cable operator or in which the operator has an attributable interest."[71]

52. We thus agree with the majority of commenters who assert that the most logical interpretation of the statutory language is to apply such limits only to video programmers that

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[67] See NATOA Comments at 21. See also INTV Initial Comments at 11;

[68] The Senate Report states in relevant part that

> "The intent of this provision is to place reasonable limits on the number of channels that can be occupied by each MSO's programming services. For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system, with a minimum of 6 channels being permissible. The FCC should establish these rules based on the number of activated channels less the numbers of over-the-air broadcast signals carried and the number of public, educational and governmental and leased access channels carried. On a system with 54 channels, 14 of which are occupied by over-the-air signals or access channels, the limit then would be eight channels that could be occupied by programming owned by an MSO . . . . "
> Senate Report at 80.

[69] See NATOA Comments at 7.

[70] 47 U.S.C. § 533(f)(1)(B) (emphasis added).

[71] Conference Report at 81 (emphasis added).

are vertically integrated with the particular cable operator in question. We believe that this represents the most reasoned approach given Congress' stated objective of encouraging a diversity of voices and preventing unaffiliated programmers from being denied carriage on vertically integrated cable systems.

53. We agree that cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO. Moreover, a vertically integrated cable operator appears to have significantly less power to control the content or distribution of a programing service in which it has no ownership interest. Further, we believe that application of the channel occupancy limits to all vertically integrated programmers, regardless of whether they are affiliated with the particular cable operator, would severely inhibit MSO investment in video programming services, since the mere fact of such MSO investment may restrict carriage of the video programming service on all cable systems. In the absence of significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO. Such a restriction would be unduly burdensome on MSO investment in cable programming and would be contrary to the purpose of the statute. Moreover, we seek to adopt reasonable carriage limits that will balance both the benefits and concerns associated with vertical integration.

54. With respect to calculating channel capacity, we conclude that all activated channels should be taken into account. We note that cable operators are obligated by the 1992 Cable Act to carry local broadcast and noncommercial educational channels, and are required to reserve channel capacity for lease to unaffiliated programmers. Consequently, we conclude that it would be unreasonable to use such channels to reduce the base of channels available for carriage of vertically integrated programing. We believe that the such an approach would penalize cable operators who carry the broadest array of broadcast channels by decreasing the number of channels available for carriage of vertically integrated programing. In addition, we note that there is precedent for including all channels in the calculation of channel capacity in the must carry and leased access provisions of the Communications Act, which take into account all activated channels in determining a cable operator's carriage obligations.[72] Moreover, carriage of broadcast, PEG and leased access channels promotes diversity and provides alternative sources of unaffiliated programming to cable subscribers in furtherance of the statutory objectives. In this regard, we disagree with NATOA's argument that the legislative history requires that the Commission subtract all broadcast, PEG

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[72] 47 U.S.C. §§ 532, 534.

and leased access channels prior to application of the channel occupancy limits. The Senate Report language relied upon by NATOA appears to be included merely as an example to illustrate how the Commission may decide to calculate channel occupancy limits and therefore does not prohibit the Commission from adopting an alternative approach if it finds such an approach to be reasonable to promote the legislative objectives. In any event, this language is not included in the statute itself.

55. Finally, we address the arguments advanced by some commenters that the channel occupancy provisions of the 1992 Act violate the First Amendment. At the outset, it should be noted that the Commission has an obligation to execute and enforce the provisions of Section 11 enacted by Congress and therefore is not free to declare an act of Congress unconstitutional.[73] Nevertheless, we believe that the statute is constitutional. We note that Congress, in enacting the cable access provisions under the Cable Communications Policy Act of 1984, P.L. 98-549, and the cable must carry obligations under the 1992 Cable Act, carefully considered the First Amendment rights of cable operators and others and concluded that these provisions were constitutionally permissible as consistent with and in furtherance of the goals of the First Amendment.[74] We believe that the channel occupancy limits provided in Section 11 are generally analogous to the cable access and must carry provisions and, similarly, do not believe that these limits infringe the First Amendment rights of cable operators or others. Moreover, we note that the federal district court in Daniels Cablevision, Inc. v. United States, which struck down the subscriber limit authority in Section 11, upheld other provisions of the 1992 Cable Act in dispute, including the Section 11 channel occupancy limits, as "facially compatible with the First Amendment."[75]

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[73] See Johnson v. Robinson, 415 U.S. 361, 368 (1974) and Meredith Corp. v. FCC, 255 U.S. App. D.C. 22, 31 (D.C. Cir. 1987).

[74] See H.R. Rep. No. 934, 98th Cong., 2d Sess. at 31-36 (1984) and H.R. Rep. No. 628, 102d Cong., 2d Sess. 58-67 (1992). Indeed, although subject to further review by the U.S. Supreme Court, the cable must carry provisions of the 1992 Act were recently upheld as constitutional as against First Amendment challenges by cable operators and others. Turner Broadcasting System, Inc. v. FCC, 819 F. Supp. 32 (D.D.C. 1993)(three-judge court).

[75] The Court in Daniels Cablevision, Inc. said that "the channel occupancy limits appear unrelated to content" but added:

> Whether or not the regulations ultimately promulgated by the Commission will pass constitutional muster under